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No. 92-606

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,
v.
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES, an unincorporated association, BEN OCHOA, GENERAL CHAIRMAN, E.R. SPEARS, GENERAL CHAIRMAN, PAUL S. SWANSON, GENERAL CHAIRMAN, and BRUCE G. GLOVER, GENERAL CHAIRMAN, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' OBJECTION TO THE FILING OF AMICUS BRIEFS PRIOR TO THE CONSIDERATION OF THE PETITION

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RESPONDENTS' OBJECTION TO THE FILING OF AMICUS BRIEFS PRIOR TO THE CONSIDERATION OF THE PETITION

Pursuant to Supreme Court Rule 37.4, Respondents Brotherhood of Maintenance of Way Employes, Ben Ochoa, E. R. Spears, Paul S. Swanson, and Bruce G. Glover ("Respondents") object to the filing of the *amicus curiae* brief by the Association of American Railroads ("AAR") and the Airline Industrial Relations Conference ("AIRCON"), and as reason for the withholding of consent, respectfully show as follows:

I. THE PROPOSED *AMICUS CURIAE* BRIEF MERELY REPEATS THE LEGAL ARGUMENTS OF THE PETITION

The proposed amici never directly approached Respondents to obtain our consent; nor were Respondents ever advised what matters were to be addressed in the *amicus curiae* briefs which had not already been presented to the Court by Petitioner.[1] In light of the 1990 revisions to Rules 37.1 and 37.2, Respondents believed that it would be inappropriate to consent to the filing of an *amicus curiae* brief without at least knowing what additional matters were to be addressed which were not already addressed by Petitioner.[2]

However, after now reviewing the legal arguments contained in AAR's and AIRCON's *amicus curiae* brief, it is evident that it presents nothing new and simply repeats the arguments made by Petitioner. The Court has indicated in Rule 37.1 that *amicus curiae* briefs of this nature are a burden on the Court and are not favored. Moreover, AAR and AIRCON's motion for leave to file their brief is further deficient in that it fails to set forth specifically the "facts or questions of law that have not been . . . presented by the parties and their relevancy to the disposition of the case" as required by Rule 37.4. The allegation that AAR and AIRCON represent a number of employers subject to the Railway Labor Act does not address that issue. Therefore, since the proposed *amicus curiae* brief is simply duplicative of the Petition, leave to file it should be denied.

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[1] Consent was sought not by AAR or AIRCON, but by the Petitioner who had apparently arranged for the filing of the proposed *amicus curiae* brief by these non-parties.

[2] Moreover, as no notice was provided regarding what, if any, new matters amici intended to address in their brief, Respondents would be effectively deprived of an opportunity to incorporate a response to those arguments in their Brief in Opposition by its due date.

II. THE PARTIES HAVE ALREADY ADDRESSED ALL MATTERS RELEVANT TO THE CONSIDERATION OF THE PETITION UNDER RULE 10.1.

This case does not present a question involving a conflict among the Circuits or a decision which is contrary to any Supreme Court precedent;[3] but rather merely presents an issue which has been a settled question of federal labor law for over three decades. The considerations specified in Supreme Court Rule 10.1(a) and (c) have already been addressed by the parties in their briefs. Furthermore, the clear message to counsel conveyed by Rule 37.2 is that the Court does not want to encourage the proliferation of *amicus curiae* briefs prior to the consideration of the writ.[4] Rule 37.2 specifically

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[3] The two Circuit Courts which have addressed the issue reached the same result and both confirmed that there is no conflict with existing Supreme Court precedent. *Burlington Northern Railroad Company v. Brotherhood of Maintenance of Way Employes*, 961 F.2d 86 (5th Cir.), *reh'g en banc denied*, 968 F.2d 18 (5th Cir. 1992); *Louisville & Nashville Railroad Company v. Brown*, 252 F.2d 149, 155 (5th Cir.), *cert. denied*, 356 U.S. 949 (1958); *CSX Transportation, Inc. v. N.J. Marquar, et al.*, No. 91-5689, slip op., —— F.2d ——, 141 LRRM 2785, 2800-2803 (6th Cir. November 13, 1992). As pointed out in those decisions, there are no other Appellate or District Courts in the sixty-six year history of the Railway Labor Act to reach a contrary result.

[4] Indeed, Respondents discussed with the Rail Labor Executives Association (the association of the chief executives of the railway labor organizations), and with the American Federation of Labor the advisability of filing *amicus curiae* briefs in *opposition* to the grant of *certiorari*, in the event that an *amicus curiae* brief was filed in favor of granting the writ. However, Respondents took seriously the admonitions of Rules 37.1 and 37.2. Therefore, since this case involved no conflict among the decisions of the Circuit Courts or with a decision of this Court, and the parties could adequately address the issues relevant to the grant of *certiorari* under Rule 10.1, Respondents concluded that this Court should not be further burdened with briefs. This seemed particularly apropos in a case, such as this, which presents an issue which has been settled for over three decades.

states that when one party withholds consent a motion for leave to file an *amicus* brief is not favored at that stage. This is true even if the *amicus curiae* brief meets the test of Rule 37.1, which, in any event, this *amicus curiae* brief does not.

III. ALTERNATIVELY, IF LEAVE IS GRANTED FOR THE FILING OF THE *AMICUS CURIAE* BRIEF, THE COURT SHOULD NOTE THAT ITS ARGUMENTS ACTUALLY SUPPORT DENIAL OF *CERTIORARI*

In the event that the Court permits the filing of the *amicus curiae* brief, Respondents respectfully request that the Court note that its arguments in certain critical respects actually support Respondents position that *certiorari* should be denied. Amici acknowledged that its members administer literally thousands of collective bargaining agreements with numerous unions and are continually involved in minor disputes over their application. Amici also admit that the issue presented here has not often been considered by the Courts since strikes over minor disputes do not often occur. Amici further acknowledge that on the comparatively few occasions when strikes over minor disputes have occurred,[5] that railroads and airlines have always sought, and the courts have granted, injunctive relief to channel the dispute into the statutory dispute resolution mechanisms of the Railway Labor Act ("RLA"). Amici find no fault with the over sixty years of judicial utilization of injunctive relief to ensure compliance with the RLA procedures by unions, as well as carriers.

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[5] As was the case here, which is characteristic of the few cases in which the issue has arisen, the strike was over a dispute which the union believed was major (in which case self help would be lawful) resulting from a unilateral contract change in violation of § 2 Seventh of the Railway Labor Act (45 U.S.C. § 152 Seventh), but which the District Court later determined was minor.

Amici now argue, however, that Congressional deregulation of the airline and railroad industries will lead, or has lead, to more union-employer controversies which might lead to more strikes. However, no factual basis is submitted to demonstrate that this has been true in the past, even though deregulation in the railroad and airline industries have been in effect for more than a decade. Furthermore, Amici's crystal ball prediction that strikes over minor disputes will be more likely in the future because of the decision below is pure speculation, and there is certainly no factual basis supporting this conclusion. Indeed even if Amici's fears were true, this is a question of labor policy which should be addressed to Congress, and not to this Court.[6] *See "Respondents' Brief in Oppoistion,"* pp. 20-23.

CONCLUSION

Considering that this case involves a question which has been settled for thirty four years, Respondents withheld their consent to the filing of *amicus curiae* briefs in deference to the Court's sentiment expressed in Rule 37.2, that amicus briefs before consideration of the writ are not favored. This is particularly so when, as here, the parties can, and have, addressed the relevant considerations specified in Rule 10.1 (*i.e.* the lack of a conflict in the circuits or with applicable Supreme Court precedent), and the *amicus curiae* brief adds nothing new bearing on those issues.

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[6] Amici's analysis is further flawed since even assuming competitive pressures in the deregulated environment could lead to strikes over wage and other economic disputes, these would necessarily arise only in the context of major disputes over contract formation issues and not in the context of minor disputes over contract interpretation issues.

Respectfully submitted,

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